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DATE ISSUED: April 13, 2000

CASE NO.: 1998-LHC-00988

OWCP No.: 01-19268

In the Matter of

DAVID K. WILLIAMS
Claimant

v.

GENERAL DYNAMICS CORPORATION
Employer/Self-Insurer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:

Carolyn P. Kelly, Esq.
For the Claimant

Edward J. Murphy, Jr., Esq.
Peter D. Quay, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
For the Director

BEFORE: **LAWRENCE P. DONNELLY**
Administrative Law Judge

DECISION AND ORDER ON MODIFICATION - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on April 13, 1999 in Boston, Massachusetts at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs have been admitted into evidence as CX 45 and RX 5. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

PROCEDURAL HISTORY

By his Decision and Order of July 25, 1978 Administrative Law Judge Robert S. Amery awarded the Claimant compensation for temporary total disability pursuant to Section 8(b) of the Act, 33 U.S.C. 908(b), for the period May 15, 1975 to December 30, 1975 at the rate of $156.45 per week. Judge Amery further ordered the Employer to pay the Claimant compensation for a 40% permanent partial disability, under provisions of Section 8(c)(21), of the Act, 33 U.S.C. 908(c)(21) from December 31, 1975 and continuing at the rate of $62.58 per week for 104 weeks after which the Claimant's benefits were to continue at the same rate and to be paid out of the Special Fund established by Section 44 of the Act under provisions of Section 8(f). In his Decision and Order on Remand of March 31, 1980, Judge Amery amended his earlier findings and ordered the Employer to pay the Claimant temporary total disability compensation pursuant to Section 8(b) of the Act for the period May 15, 1975 to December 20, 1975 at $156.45 per week. Also, Judge Amery ordered the Employer to pay the Claimant compensation for permanent total disability, pursuant to Section 8(a) of the Act, commencing November 5, 1977, at the rate of $156.45 per week, plus all statutory adjustments, for 104 weeks. After that, the Administrative Law Judge directed the Claimant's benefits were to continue at the same rate, with subsequent statutory adjustments, to be paid out of the Special Fund established by Section 44 of the Act under provisions of Section 8(f) of the Act. (RX 1 and RX 2).

The Findings of Fact and Conclusions of Law made by Judge Amery are binding upon the parties as the "Law of the Case" and by **Res Judicata** and Collateral Estoppel and are incorporated herein by reference and as if stated **in extenso** and will be reiterated herein solely for purposes of clarity and to deal with the Employer's **Motion for Modification.**

Summary of the Evidence

As noted above, the underlying facts of this case are set out in Judge Amery's two decisions. The Claimant was 37 years old at the time of the original hearing on February 27, 1978. (RX-1-2) He had a high school education. On November 12, 1973 while working as a test technician on submarines for the Employer, Claimant injured his back. **Id**. He was treated by Dr. German and was out of work for about three months, returning to light duty on February 4, 1974. (RX-1-3) He injured his back again on May 14, 1975. The Claimant saw Dr. German again and was treated conservatively, but ultimately had surgery on July 29, 1975. He returned to the Employer to work in the pipe shop, but this job required much walking which caused Claimant problems. **Id**. at 1-4. On November 4, 1977, he was laid off and sought a transfer into other departments but was precluded from returning because of Dr. German's restrictions against lifting over 25 pounds or standing more than 1 to 2 hours at a time. **Id**. Thereafter, although Claimant looked for work, he was unable to secure any. **Id**. at 1-5. In his first decision, Judge Amery found the Claimant to be permanently partially disabled. However, that decision was appealed and the Benefits Review Board reversed his finding regarding the extent of Claimant's permanent disability. (RX-2-1) A second hearing was held and Claimant testified that he had moved to New Hampshire on July 4, 1979. **Id**. at 2-3. At the hearing, Claimant testified that he had tried to get work in about 350 places, that he had visited vocational rehabilitation departments in both Connecticut and New Hampshire, but had been unsuccessful in locating work he could do. At the second hearing, the Employer attempted to present evidence of suitable alternate employment, bu Judge Amery found that the Employer did not carry its burden of showing actual job opportunities available to this Claimant. **Id**. at 2-6. The Claimant's average weekly wage on the date of his injury in 1975 was found to be $234.68 with a compensation rate of $156.45. (RX- 1-2)

At the time of this hearing on modification, Claimant was almost 59 years old and continued to reside in New Hampshire. (TR- 36) In 1983, he purchased a house on 35 acres and went into a partnership with other people which was called Lempster Common Associates. **Id**. at 37. The partnership erected a commercial building on the property which at the time of the hearing was rented to the post office and the Junk Food Store. **Id**. at 38. There was a mortgage on the property to the Bank of New Hampshire for $350,000. **Id**. Apparently, the partners had a falling out, and after court action, Claimant was the only one of the partners with any claim to the property. He does not, however, pay the mortgage. The Bank was at the time of the hearing taking no action against him. Claimant uses the rent from the post office to pay taxes and other expenses on the property. **Id**. at 39.

The house that was originally on the 35 acres burned down in 1988 or 1989. **Id**. at 40. In the mid-90s, Claimant moved himself into space in the commercial building. The Junk Food Store was established in 1995 after another similar store had closed down. Claimant's income tax return for 1994 shows that after paying taxes, repairs and utilities on both the commercial property and a residential rental property, the store operated at a loss totaling $13,129.00. (CX-41-3) In 1995 his tax return shows a similar situation. (CX-42-1) It should be noted that mortgage payments were not made in either year. Claimant's income tax return from 1996 is the first year which references the convenience store, although he testified that he thought it was 1995. (TR-42, CX-43-3) He testified that his grandchildren helped in the store and that often people would come in and ring up their own sales. **Id**. During the times that he was hospitalized, local people would help out. He never paid any of them and his tax returns for 1996 and 1997 show no salaries being paid. (TX-43, CX-43,44) In 1998, Claimant brought in a partner who hopes to get financing to buy the store business. (TX-46) The woman is called Yvonne and is essentially running the store now. (TX-46) When he is not in the hospital, Claimant spends the day at the store although he said he is usually either sleeping or having coffee or something. (TX-57) Either he or Yvonne does the ordering. **Id**. There apparently is also a room next to the store from which tools are sold. **Id**. at 59.

Daniel P. Blake, a private investigator hired by the Employer, began surveillance of Mr. Williams in 1994 and Mr. Blake observed Mr. Williams five times at the convenience store between April of 1994 and March of 1999. On two of these occasions, Mr. Williams was the only person in the store. However, it is primarily a self-serve operation, so his "job" is simply to accept cash from the customers as they left. On one occasion, there was a woman in her 30's operating the cash register and she would occasionally have to ask Mr. Williams for the prices of certain items, and in March of 1999 there was an older woman who was handling the register. Mr. Blake had witnessed Claimant either seated near the register or actually operating the register, but never performing any other kind of activity there. **Id**. at 17.

Mr. Dennis King, a rehabilitation counselor was asked by the Employer to see if there were jobs available as a convenience store clerk. He testified that the job of a clerk involved working the cash register, stocking shelves, reaching overhead usually for cigarette sales and that usually there is a stool available to sit on. (TX-24,25) The physical requirements of the job required from 3 to 5 hours of walking. (TX-29, RX43, 4-6, 4-9, 4-12, 4-15) In addition, it required standing 2 ½ to 4 hours. **Id**. He also stated that reliability in showing up at the job would be important in maintaining the job. (TX-30)

In 1990 Claimant underwent a discectomy and fusion at C4-5. (CX-1-3) The past medical history in that hospital report noted chronic low back pain. (CX-1-2) In August 1992, a medical report from the VA Hospital refers to lumbar problems since the disc operation in 1975, as well as syncopal episodes. (CX-21) The immediate problem in 1992 was, however, a cervical discectomy at C6-7. (CX 21,2) In February of 1996, Williams was admitted to White River Junction VA Hospital for unstable angina and was subsequently transferred to the Roxbury VA Hospital for a cardiac catheterization. Claimant had had an adrenalectomy and developed problems immediately

afterward with a surgical hernia. That problem persisted up to the time of the hearing. (TR-44,45) In 1997, Martha Nelson, a nurse practitioner at the Department of Veterans Affairs, wrote that "The most disabling problem at this time is the large painful incisional hernia. This pain has now exacerbated the low back pain. I would consider Claimant disabled from any gainful employment." (CX-20) A report in 1998 from the White River Junction Emergency Room reflects that Claimant maintains a very sedentary lifestyle. (CX-24-1) In September of 1998, Claimant underwent bypass surgery. (CX-25-1) At that time, the doctor reported that he would be hospitalized from 1 to 2 weeks and would require 6 to 8 weeks recovery time. (CX-26-1) Claimant's medications include tranquilizers, pain killers, heart medication and stomach medication. (TX-45)

The issue in this case is whether the Employer has proved that the Claimant's physical or economic condition has changed such that he now has an earning capacity which will justify a modification of the Decision and Order dated March 31, 1980 in which the Claimant was awarded permanent and total disability beginning November 5, 1977 at the rate of $156.45 per week.

Section 22 of the Act

Section 22 provides the only means for changing otherwise final compensation orders. Under Section 22, any party-in- interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. Section 22, as amended by the 1984 Amendments, states that "any party-in-interest" includes an Employer or Carrier granted relief under Section 8(f) and that the section applies to cases under which payments are being made by the Special Fund. Also, the 1984 amended version specifically provides that the section does not authorize the modification of settlements. The effective date of the amended Section 22 is specified in Section 28(3)(1) of the Amendments, 98 Stat. at 1655. **See Brady v. J. Young & Co.**, 18 BRBS 167, 170 n.5 (1985) (**Decision on Reconsideration**); **Lambert v. Atlantic & Gulf Stevedores,** 17 BRBS 68 (1985).

The scope of modification is not narrowed because the Employer is seeking to terminate or decrease an award. **McCord v. Cephas**, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), **rev'g** 1 BRBS 81 (1974). Section 22 was intended by Congress to displace traditional notions of **Res Judicata**, and to allow the fact-finder, within the proper time frame after a final decision or order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459, **reh'g denied,** 404 U.S. 1053 (1972); **McCarthy Stevedoring Corp. v. Norton**, 40 F.Supp. 960 (E.D. Pa. 1940).

A request for modification need not be formal in nature. It simply must be a writing which indicates an intention to seek further compensation. **Banks v. Chicago Grain Trimmers Assoc.,** 390 U.S. 459 (1968); **Fireman's Fund Insurance Co. v. Bergeron,** 493 F.2d 545 (5th Cir. 1974), **reh'g denied**, 391 U.S. 929 (1968); **Hudson, supra**, 16 BRBS 367. However, the Benefits Review Board has held that telephone calls to the Deputy Commissioner's office, made within one year of the last payment of compensation, was sufficient to constitute a request for modification as Claimant indicated during those calls that he believed he had suffered a change in condition and was seeking additional compensation. **Madrid v. Coast Marine Construction Company**, 22 BRBS 148 (1989). A deputy commissioner's written memorandum summarizing his telephone conversation with claimant was sufficient to constitute a request for modification because the memorandum reflected that claimant was dissatisfied with his compensation. **See also McKinney v. O'Leary,** 460 F.2d 371 (9th Cir. 1972). It is irrelevant whether an action is labeled an application or modification or a claim for compensation as long as the action comes within the provisions of **Banks, supra**, 390 U.S. 459.

Similarly, a Claimant is not required specifically to characterize the modification request as

being based on either a change in condition or mistake in determination of fact. **Cobb v. Schirmer Stevedoring Co.**, 2 BRBS 132 (1975), **aff'd,** 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978). Moreover, an Administrative Law Judge is not precluded from modifying a previous order on the basis of a mistake in fact although the modification was sought for a change in condition. **Thompson v. Quinton Engineers, Inc.**, 6 BRBS 62 (1977); **Pinizzotto v. Marra Bros., Inc.**, 1 BRBS 241 (1974). **See also O'Keefe v. Aerojet-General Shipyards, Inc.**, 404 U.S. 254, 92 S.Ct. 405 (1972), **reh'g denied**, 404 U.S. 1053, 92 S.Ct. 702 (1972); **McDonald v. Todd Shipyards Corp.**, 21 BRBS 184 (1988).

Modification based on a change in condition is granted where the Claimant's physical condition has improved or deteriorated following entry of the award. The Board has stated that the physical change must have occurred between the time of the award and the time of the request for modification. **Rizzi v. The Four Boro Contracting Corp.**, 1 BRBS 130 (1974).

The party requesting modification due to a change in condition has the burden of showing the change in condition. **See Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168 (1984) (since Claimant's inability to perform his secondary occupation of farming existed at the time of the initial proceeding and the evidence could support the Administrative Law Judge's finding of no increased loss to Claimant's injured hands, Claimant failed to demonstrate a change in condition); **Kendall v. Bethlehem Steel Corp.**, 16 BRBS 3 (1983) (Claimant did not establish that his back condition had worsened since the prior decision denying benefits and thus had no compensation disability as a result of his back injury). Since the party requesting modification has the burden of proving a change in condition, the Section 20(a) presumption is inapplicable to the issue of whether Claimant's condition has changed since the prior award. **Leach v. Thompson's Dairy, Inc.**, 6 BRBS 184 (1977).

As indicated above, the Benefits Review Board, in a reversal of prior Board precedents, held that a change in Claimant's economic condition also may provide justification for Section 22 modification. In **Fleetwood v. Newport News Shipbuilding & Dry Dock Co.**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985), the Board held that Employer should no longer have to compensate Claimant when there has been a change in Claimant's economic condition so that there is no longer a loss in wage-earning capacity. In affirming, the Fourth Circuit rejected the argument that prior cases have held to the contrary. **Finch v. Newport New Shipbuilding and Dry Dock Company,** 22 BRBS 196, 201 (1989); **Vilen v. Agmarine Contracting Inc.**, 12 BRBS 769 1980); **cf. Verderane v. Jacksonville Shipyards, Inc.** 772 F.2d 775, 17 BRBS 154 (CRT) (11th Cir. 1985), **aff'g** 14 BRBS 220.15 (1981); **General Dynamics Corp. v. Director, OWCP**, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), **aff'g sub nom. Woodberry v. General Dynamics Corp.**, 14 BRBS 431 (1981).

It is also well-settled that a modification order decreasing compensation may not affect any compensation previously paid, although Employer is entitled to credit any excess payments already made against any compensation as yet unpaid. A modification order increasing compensation may be applied retroactively if this Administrative Law Judge determines that according retroactive effect to the modification order renders justice under the Act. **McCord, supra,**532 F.2d at 1381.

Under Section 22 of the Act, any party may request a modification of a Decision and Order based on a change in conditions or because of a mistake in a determination of fact at any time prior to one year after the date of the last payment of compensation. **See** 33 U.S.C. § 922. A "change in conditions" can be either a change in the claimant's physical condition or a change in his economic condition. If a change in either the claimant's physical condition or economic condition results in a change in his wage-earning capacity since the date of the last hearing, either party may request a modification of the order on the issue of extent of disability. **See Metropolitan Stevedore Co. v. Rambo**, 515 U.S. 291, 115 S. Ct. 2144, 2150 (1995).

The Section 22 modification procedure is designed to ensure that disability awards under the Act remain appropriate as the claimant's medical and economic conditions change over time:

> The fundamental purpose of the Act is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury; where wage-earning capacity has been reduced, restored, or improved, the basis for compensation changes and the statutory scheme allows for modification. **Rambo, supra.**

The issue in this case is whether the Employer has met its burden of proving that the Claimant's physical or economic condition has improved since the 1980 Decision and Order awarding benefits for permanent total disability so as to justify a reduction of the Claimant's benefits to permanent partial disability benefits based on a demonstrated earning capacity. "Change in condition necessarily implies a change from something previously existing." **Jarka v. Hughes**, 299 F.2d 534, (2d Cir. 1962). Modification should not be granted where the evidence does not establish that there has been a change in condition. In a case in which the claimant was awarded benefits based on a stipulation that he had a 50% permanent impairment, and there was conflicting medical evidence available at the first hearing that the claimant had a 15% disability, the D.C. Circuit Court of Appeals ruled that the award should not have been modified to reflect that the claimant had a 15% disability because there was no change in the claimant's physical condition at the time of the request for a modification. **See Pistorio v. Einbinde**, 351 F.2d 204 (1965).

While Claimant points out that he has not earned any wages since the last hearing, the issue is whether there has been a change in either his physical or economic condition such that he **now** has an earning capacity. The Employer prevails under Section 22 if it shows either that Claimant condition has improved by virtue of the fact hat he can now perform work or that he has received additional education or training so that he is now more marketable than he was at the time of the last hearing. In this case the Employer has suggested that because of his activity in the Junk Food Store, Claimant could be employed as a convenience store clerk.

However, Claimant testified most credibly that the condition of his back varies from day to day, that he has his good days and bad days and that on these latter days, he must remain in the house and lay down. He also testified that he would be unable to work full-time because of his multiple medical problems.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is

capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work at the shipyard. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit probative and persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability, as further discussed below.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

As noted above, Judge Amery has resolved that issue and he awarded Claimant permanent total disability benefits commencing on November 5, 1977. (RX 2)

An employer can establish suitable alternate employment by offering an injured employee a

light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there

is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

In the case at bar, the Employer submits that Claimant's activities at the convenience store establish that he has a wage-earning capacity. However, I disagree for the following reasons:

A place similar to the Junk Food Store would not be employing anyone for several reasons. First of all, it could not remain in business because it does not take enough money, and secondly, it has never employed anyone. The tax return for 1997 shows that the Junk Food Store paid no rent to Lempster Common (the defunct partnership for the real estate) although in 1996 it did pay $6,000 in rent. That is shown because the rental income for 1996 is $16,800, and the store shows a payment of rent. However, in 1997 that is not the case.

Moreover, Claimant's activities with regard to the store are much more like an owner, than a clerk. He is hoping to spin this business off to someone who can make a profit and pay rent so he can hang on to his real estate investment, although that seems very unlikely given its present financial picture.

Claimant credibly testified that he used to do the ordering,
but now he shares that with Yvonne and that most of the time he sat in his recliner chair, which is where he slept. (**See** TR 42, 47) When he was at the store, he did run the cash register, but his grandchildren and other people did most of the stocking. It also appears that when he was not feeling up to it, other people worked the cash register, or probably just left money on the counter. At the time of the hearing, he had not been in the store in several weeks.

Claimant testified that the condition of his back varies from day to day. Some days he can stand pretty well and other days he cannot, in which case he lays down. He said he did not do much walking because of his hip and back and also because of his asthma. (TR 51) In this case, the Employer has not submitted any evidence that Claimant's physical condition has improved or that he has obtained additional training or education. It is clear that Claimant is worse now that he was in 1980. He has had two operations including a fusion on his neck. He has had syncopal episodes, a heart attack and bypass surgery as well as multiple surgeries to repair a hernia. He is also 20 years older than he was at the time of the hearing. The Employer submits that Claimant's activities at the Junk Food Store are the equivalent of working for someone else as a convenience store clerk. The only reason he was able to function at all in the store was because he owned it, and he could do what he wanted to do. It is unrealistic for the Employer to expect that he could function as an employee in someone else's store given his physical restrictions and the overall status of his health and his age. While some of Claimant's health problems are not work-related, they nevertheless combine with his work-related disabilities to complete the picture of someone who is not employable.

Section 8(h) of the Act dealing with the determination of wage earning capacity states:

> ...that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage earning capacity, the Deputy Commissioner (now the District Director and/or the Administrative Law Judge) may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual

> employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

I also note that the private investigator retained by the Employer to conduct surveillance of the Claimant did so between April of 1994 and March of 1999 and he observed the Claimant only five (5) times at the store. Those limited observations do not establish a pattern or routine behavior such that I can infer that Claimant has now a wage-earning capacity to work four-to-eight hours daily, five days a week. That limited investigation, in my judgment, does not lead to the conclusion that Claimant has a wage-earning capacity. Claimant's limited activities at the store are actually a form of "sheltered employment."

As indicated above, the Employer has also offered a Labor Market Survey (RX 4) in an attempt to show the availability of work for Claimant as a convenience store clerk at other stores. I cannot accept the results of that very superficial survey which apparently consisted of the counselor making a number of telephone calls to prospective employers. While the report refers to personal contacts with area employers, I simply cannot conclude, with any degree of certainty, which prospective employers were contacted by telephone and which job sites were personally visited to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the testimony (RX 4) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information about the specific nature of the duties of a clerk at those stores, and whether such work is within the doctor's physical restrictions. (RX 4)

Moreover, any convenience store employing Claimant would have to be a beneficent employer because Claimant, with his good and bad days, simply cannot be depended upon to report for work, in all types of weather, on a regular basis.

Thus, I find and conclude that the Employer has not established the availability of suitable alternative employment and that the Employer's Motion for Modification shall be, and the sane hereby is **DENIED**.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988);

Barbour v. Woodward & Lothrop, Inc., 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on June 17, 1999 (CX 46), concerning services rendered and costs incurred in representing Claimant between December 5, 1998 and June 14, 1999. Attorney Carolyn P. Kelly seeks a fee of $8,9092.23 (including expenses) based on 43 hours of attorney time at $185.00 per hour and 10.75 hours of paralegal time at $55.00 per hour.

In accordance with established practice, I will consider only those services rendered and costs incurred after December 3, 1997, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration although the Special Fund is currently paying benefits to the Claimant the Employer is responsible for the attorney fee being awarded herein. **Bingham v. General Dynamics Corporation,** 20 BRBS 198 (1988)

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's lack of objections to the requested fee (RX 5), I find a legal fee of $8,902.23 (including expenses of $355.98) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively verified by the District Director.

It is therefore **ORDERED** that:

1. The Motion for Modification filed by the Employer shall be, and the same hereby is **DENIED**.

2. The Special Fund shall continue to pay appropriate benefits to the Claimant as directed by Judge Amery's decision. (RX 2)

3. The Employer as a self-insurer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the second Order provision above, subject to the provisions of Section 7 of the Act.

4. The Employer shall pay to Claimant's attorney, Carolyn P. Kelly, the sum of $8,902.23 (including expenses) as a reasonable fee for representing Claimant herein before the Office of

Administrative Law Judges between December 5, 1997 and June 14, 1999.

LAWRENCE P. DONNELLY
Administrative Law Judge

Dated: April 13, 2000
Camden, New Jersey
LPD:las